Court File No. VIC-S-S-2512528

Court File No._____
Victoria Registry

SUPREME COURT OF BRITISH COLUMBIA SEAL 19-Nov-25 Victoria REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

In the Matter of the *Environmental Assessment Act,* S.B.C. 2018, c. 51
and the *Judicial Review Procedure Act,* R.S.B.C. 1996, c. 241

BETWEEN:

CHILKAT INDIAN VILLAGE; CRAIG TRIBAL ASSOCIATION, DOUGLAS INDIAN ASSOCIATION; HYDABURG COOPERATIVE ASSOCIATION, KETCHIKAN INDIAN COMMUNITY; KLAWOCK COOPERATIVE ASSOCIATION; METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE; ORGANIZED VILLAGE OF KASAAN; ORGANIZED VILLAGE OF KAKE; ORGANIZED VILLAGE OF SAXMAN; PETERSBURG INDIAN ASSOCIATION; SITKA TRIBE OF ALASKA; WRANGELL COOPERATIVE ASSOCIATION; YAKUTAT TLINGIT TRIBE; and SOUTHEAST ALASKA INDIGENOUS TRANSBOUNDARY COMMISSION

PETITIONERS

AND:

LIEUTENANT GOVERNOR IN COUNCIL and CHIEF EXECUTIVE ASSESSMENT OFFICER OF THE ENVIRONMENTAL ASSESSMENT OFFICE

RESPONDENTS

PETITION TO THE COURT

ON NOTICE TO:

Lieutenant Governor in Council
c/o Ministry of Attorney General
Legal Services Branch
PO Box 9290 STN PROV GOVT
1001 Douglas Street
Victoria, B.C. V8W 9J7

Environmental Assessment Office
PO Box 9426 Stn Prov. Govt.
Victoria, B.C. V8W 9V1

The address of the registry is:

P.O. Box 9248 Stn Prov Govt
850 Burdett Avenue
Victoria, B.C. V8W 9J2

The petitioners estimate that the hearing of the petition will take four (4) days.

[✓] This matter is an application for judicial review.

[ ] This matter is not an application for judicial review.

This proceeding is brought for the relief set out in Part 1 below, by

[✓] the persons named as petitioners in the style of proceedings above.

[ ] .....[*name(s)*].....(the petitioner(s))

If you intend to respond to this petition, you or your lawyer must

(a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and

(b) serve on the petitioners

(i) 2 copies of the filed response to petition, and

(ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

Time for response to petition

A response for petition must be filed and served on the petitioners

(a) if you were served with the petition anywhere in Canada, within 21 days after that service,

(b) if you were served with the petition anywhere in the United States of America, within 35 days after that service,

(c) if you were served with the petition anywhere else, within 49 days after that service, or

(d) if the time for response has been set by order of the court, within that time.

(1)	The ADDRESS FOR SERVICE of the petitioners is: Fax number address for service (if any) of the petitioners: n/a E-mail address for service (if any) of the petitioners: john@cascadialegal.ca
(2)	The name and office address of the petitioners lawyer is: Cascadia Legal LLP 201-736 Broughton Street Victoria, B.C. V8W 1E1 Attention: John W. Gailus

Claim of the Petitioners

Part 1: ORDERS SOUGHT

1. A declaration that Order in Council No. 364/2024 is *ultra vires* and inconsistent with the *Environment and Land Use Act*;

2. An order in the nature of *certiorari* quashing Order in Council No. 364/2024;

3. A declaration that the Petitioners Craig Tribal Association, Hydaburg Cooperative Association, Klawock Community Association, Metlakatla Indian Community, Organized Village of Kasaan, Organized Village of Saxman, and Ketchikan Indian Community are each a Participating Indigenous Nation under section 14 (2) of the *Environmental Assessment Act* with respect to the Eskay Creek Revitalization Project;

4. In the alternative, an order in the nature of *mandamus* directing the Chief Executive Assessment Officer of the Environmental Assessment Office to render a decision on the Petitioners' request by Petitioners Craig Tribal Association, Hydaburg Cooperative Association, Klawock Community Association, Metlakatla Indian Community, Organized Village of Kasaan, Organized Village of Saxman, and Ketchikan Indian Community for Participating Indigenous Nation status under section 14 (2) of the *Environmental Assessment Act* in relation to each of the projects from which they have been excluded by Order in Council No. 364/2024 from participating Indigenous Nation status;

5. A declaration that British Columbia has acted in bad faith and engaged in sharp dealing in breach of the honour of the Crown;

6. A declaration that British Columbia has failed to discharge its duty to consult and accommodate the Petitioners with regard to the potential adverse impacts of the projects exempted pursuant to Order in Council No. 364/2024;

7. A declaration that British Columbia has a duty of deep consultation with the Petitioners, Southeast Alaska Indigenous Transboundary Commission, Craig Tribal Association, Hydaburg Cooperative Association, Klawock Community Association, Metlakatla Indian Community, Organized Village of Kasaan, Organized Village of Saxman, and Ketchikan Indian Community in relation to Eskay Creek Revitalization Project, which project is exempted from meaningful consultation by Order in Council No. 364/2024;

8. An order for special costs of this application; and,

9. Such further and other relief as this Court may deem appropriate and just.

Part 2: FACTUAL BASIS

I. THE PARTIES

A. The Petitioners

1. The Petitioner Southeast Alaska Indigenous Transboundary Commission ("SEITC") is a consortium of 14 Tlingit, Haida, and Tsimshian Tribes whose contemporary villages are situated in the Alaska Panhandle. SEITC was established in 2014 to defend the transboundary rivers in these Tribes' traditional territories, including the Taku, Stikine, and Unuk Rivers, and their watersheds (the "Transboundary Watersheds"), and to defend these Tribes' ways of life from rapidly expanding mining development occurring in those rivers' headwaters on the Canadian side of the Canada-United States ("U.S.") border between British Columbia ("B.C.") and Alaska (the "Border").

2. The Petitioner Hydaburg Cooperative Association is located on Prince of Wales Island, Alaska.

3. The Petitioner Ketchikan Indian Community is located on Revillagigedo Island, Alaska.

4. The Petitioner Organized Village of Kasaan is located on Prince of Wales Island, Alaska.

5. The Petitioner Klawock Cooperative Association is located on Prince of Wales Island, Alaska.

6. The Petitioner Craig Tribal Association is located on Prince of Wales Island, Alaska.

7. The Petitioner Metlakatla Indian Community is in Metlakatla, Alaska, and is located on Annette Island.

8. The Petitioner Organized Village of Saxman is located on Revillagigedo Island, Alaska.

9. The Petitioners named in paragraphs 2 through 8 are hereafter referred to as the "Seven Tribes".

10. The Petitioner Sitka Tribe of Alaska is located on Baranof Island, Alaska.

11. The Petitioner Wrangell Cooperative Association is located on Wrangell Island, Alaska.

12. The Petitioner Yakutat Tlingit Tribe is located in the borough of Yakutat, Alaska.

13. The Petitioner Organized Village of Kake is located on Kupreanof Island, Alaska.

14. The Petitioner Petersburg Indian Association is located on Mitkof Island, Alaska.

15. The Petitioner Douglas Indian Association is located in the City and Borough of Juneau, Alaska.

16. The Petitioner Chilkat Indian Village is located near the mouth of the Chilkat River in Alaska.

17. The 14 Petitioners referred to in paragraphs 2 through 8 and 11 through 16 are hereafter referred to as the "Tribes".

18. Many of the Tribes are small, remote communities with a few hundred members or fewer. Each are Tribal governments in the state of Alaska and are responsible for providing services and support to their members and representing their members' interests before the Alaska and U.S. federal governments.

B. The Respondents

19. The Respondent, Lieutenant Governor in Council (the "LGIC"), is the body responsible for passing regulations pursuant to section 7 of the *Environment and Land Use Act* (the "ELUA") including the Order in Council at issue in this Petition.

20. The Respondent, Chief Executive Assessment Officer of the Environmental Assessment Office (the "EAO"), is the statutory decision-maker appointed by the LGIC, responsible for determinations of Participating Indigenous Nation ("PIN") status under s.14(2) of the *Environmental Assessment Act* (the "EAA").

21. The Respondents are referenced throughout the Petition as "British Columbia", the "Province", the "Crown", the "LGIC" or the "EAO", depending upon the context.

II. CLAIM TO ABORIGINAL RIGHTS IN BRITISH COLUMBIA

A. Background

22. In April 2021, the Supreme Court of Canada issued its decision in *R. v Desautel,* 2021 SCC 17 [*Desautel*]. The court held that "aboriginal peoples of Canada" in section 35(1) of the *Constitution Act, 1982* ("Section 35") means the modern-day successors of Aboriginal societies that occupied Canadian territory at the time of contact.

23. The court confirmed that U.S.-based Tribes may have both substantive rights – e.g. hunting, fishing and Aboriginal title – as well as procedural rights to consultation.

24. British Columbia's arguments that U.S.-based Tribes could be entitled to lesser common law rights and were not owed a duty of consultation were rejected by the court (*Desautel* at paras. 67-70). In spite of the court's rejection of two-tiered Aboriginal rights, the Province continues to express this view.

25. Regarding consultation, the court placed the onus on U.S.-based Tribes to put the Crown on notice of their claims and then the onus shifts to the Crown to make a decision whether to consult and the level of consultation (*Desautel* at paras. 75-76).

26. In 1959, the United States Court of Claims, in *Tlingit and Haida Indians of Alaska v. United States*, No. 47900, 177 F. Supp. 452 (1959) [*Tlingit and Haida*], held that the Tlingit Indians, and to a lesser extent, the Haida Indians, held Indian [Aboriginal] title to southeastern Alaska, because of their exclusive use and occupation of those lands at the time the U.S. acquired Alaska from Russia in 1867, and their continued use and occupation of the same without interference by the United States or its citizens until 1884 (*Tlingit and Haida*, at 468).

27. The Unuk River is a transboundary river that forms a corridor through the coastal mountains dividing the Alaska Panhandle from northwestern B.C. The Unuk flows from its source well inside the B.C. side of the Border, across the international Border and into Burroughs Bay in the Alaska Panhandle. The Unuk River and its watershed, as well as the other Transboundary Watersheds, were part of the recognized traditional territory of the Alaskan Tlingit (*Tlingit and Haida*, at 468).

28. Several mines have operated in the B.C. portion of the Unuk River watershed but the Eskay Creek Mine, previously in operation from 1994 to 2008 as an underground mine, was particularly close to the Unuk River. The Eskay Creek Revitalization Project (the "Eskay Project") is a proposed open pit mine at the site of the old mine.

29. The Tribes are each sovereign Tribal governments that are responsible for providing their communities with health care, implementing federal grants on Tribal roads, working to protect their members' hunting and fishing rights, and fielding frequent referrals and consultations within Alaska and the U.S. On their own, each of the Tribes faces considerable financial and organizational challenges in dealing with the risks posed to their members' rights and way of life by the mining projects in the Transboundary Watersheds.

30. The limited financial resources that are available to the Tribes after meeting their other obligations to their members and the limited financial resources available to SEITC mean that it is difficult to effectively and quickly participate in the EAO's assessment processes. Funding this participation requires community fund-raising and the limited resources available make participation slow and challenging.

B. Engagement with EAO and the Reconsideration Process

31. SEITC requested consultation in relation to projects in the Transboundary Watersheds that might adversely affect the Tribes' rights with respect to traditional territory in British Columbia by January 10, 2021. After release of the *Desautel* decision, the Crown was made aware, in a letter dated September 14, 2021, of SEITC's request for consultation and accommodation in relation to projects that might adversely affect their Aboriginal rights in British Columbia under Section 35 in the Transboundary Watersheds.

32. On August 3, 2021, the EAO advised the Seven Tribes that the proponent Skeena Resources Limited had submitted an Initial Project Description and Engagement Plan for the Eskay Project which contemplates restarting mining operations at the site of the previously operating Eskay Creek Mine. The EAO identified the Seven Tribes as being potentially affected by the Eskay Project.

33. SEITC responded to the EAO's August 3, 2021, letter on behalf of its member Tribes, and following this letter, most, but not all of SEITC's engagement with British Columbia has been regarding the Eskay Project.

34. From October 2021 to June 2025, SEITC met online with representatives of the EAO at least thirteen times.

35. Throughout their correspondence and communications with the Crown, SEITC asserted that the Tribes have unextinguished Aboriginal rights in Canada as a result of their historic use and occupation of the lands and waters forming part of the Transboundary Watersheds.

36. Throughout the communications between the EAO and SEITC, SEITC repeatedly objected to the EAO's determination that only the Seven Tribes are affected by the Eskay Project.

37. SEITC expressed an interest in being designated as a PIN pursuant to s. 14 (1) of the EAA by June 2022. On September 23, 2022, SEITC formally requested to be added as a PIN on the Eskay Project.

38. PIN Nations obtain enhanced consultation, including the following advantages:

    a. potential to lead part of or all of the effects assessment to the Nation and its rights (EAA, s. 19(4));

    b. access to capacity funding to cover costs associated with meaningful participation (EAA, s. 48);

    c. inclusion in a consensus-seeking process with EAO and other participating Indigenous Nations throughout most phases of the EA process (EAA, ss. 16(1), 19(1)-(2), 27(5), 28(3), 31(5), 32(7), 32(8));

    d. access to dispute resolution (EAA, s. 5);

    e. the opportunity to provide feedback on the scope of the EA (EAA, s. 19);

    f. the opportunity to help inform whether the proposed project is ready to proceed through the EA process, or to exempt or terminate a project (EAA, ss. 16, 17);

    g. a seat at the Technical Advisory Committee (EAA, s. 21(3));

    h. the opportunity to identify consent or lack of consent for a project and have that decision considered by the Ministers prior to issuance of an EA certificate (EAA, s. 29); and

    i. the opportunity to meet with the Minister if decisions are not in alignment with EAO recommendations (EAA, s. 29(5)).

39. On November 7, 2022, the EAO gave SEITC a deadline of November 18, 2022, to provide additional evidence of the Tribes' Section 35 rights. This deadline did not afford SEITC enough time to gather the additional evidence, given the extent and nature of the information requested, SEITC's limited resources, and the challenges inherent in gathering traditional knowledge information from disparate communities.

40. On December 12, 2022, the EAO determined under s. 14 (2) that there was no reasonable possibility that SEITC's rights under Section 35 would be adversely affected by the Eskay Project (the "PIN Determination"). The EAO acknowledged that SEITC was attempting to gather additional information to support the Section 35 claims and advised that it may reconsider the PIN Determination upon receipt of that information.

41. In the year and a half following the PIN Determination, the EAO and SEITC engaged in a continuing process pursuant to which SEITC gathered further information to support the EAO reconsidering the PIN Determination.

42. On January 30, 2024, SEITC provided the EAO with a collection of documents supporting a claim for the Seven Tribes' Section 35 rights under s. 14 (2), requesting a reconsideration of the PIN Determination, and requesting consultation pursuant to Section 35 (together, the "January 30 Materials"). The January 30 Materials included:

    a. A written submission to support the application for PIN status and the Seven Tribes' status as Aboriginal peoples of Canada in accordance with *Desautel* as well as their request for consultation under Section 35;

    b. A report by Sealaska Heritage Institute documenting Tlingit oral history showing the traditional use of the Unuk watershed (including in B.C.) by the Tèix̲wèidi Tlingit Clan and their ownership of the Unuk watershed under Tlingit law and custom;

    c. A commentary on the report by the Sealaska Heritage Institute by a Tlingit knowledge keeper;

    d. 15 testimonies of elders and knowledge keepers of the Tribes;

    e. Letters from the Seven Tribes' governments authorizing SEITC to represent their interests before the EAO with respect to the Eskay Project; and

    f. Maps setting out the boundaries of the historical territory of the Tribes.

43. Following the submission of the January 30 Materials, the EAO continued to engage with SEITC in accordance with the longstanding process for reconsideration of the PIN Determination. As late as March 28, 2024, the EAO met with SEITC and represented that the EAO's ethnohistorians were examining the January 30 Materials.

44. Instead of the EAO carrying out its reconsideration of the PIN Determination, on May 10, 2024, Assistant Deputy Minister of the Ministry of Water, Land and Resource Stewardship, Colin Ward, advised SEITC that it was considering passing an order under s. 7(1) of the *Environment and Land Use Act* ("ELUA") excluding the Tribes from PIN status in order to develop a distinct approach to consultation with U.S.-based Tribes from the consultation approach with B.C First Nations, outside of the PIN framework.

45. The elimination of PIN status under the EAA meant that the Seven Tribes would be deprived of the numerous potential rights and advantages flowing from PIN status under the EAA.

46. Due to the limited resources of SEITC and the Petitioners, it took considerable time to fund and prepare the January 30 Materials. However, at no point between the PIN Determination and May 10, 2024, did the EAO indicate any intention to terminate the process for reconsideration of the PIN Determination.

47. SEITC responded on May 31, 2024, stating that: a) the Crown was not acting honourably; b) that the record provided entitled SEITC to PIN status and meaningful consultation; c) the Crown's approach is inconsistent with *Desautel*; d) the proposed order would breach the legitimate expectations of SEITC; and e) the proposed order is inconsistent with the ELUA.

48. Order in Council 364/2024 was passed on June 27, 2024. The Order in Council excludes all of the Tribes from PIN status on the Eskay Project as well as the following projects (together with the Eskay Project, the "Excluded Projects"):

    a. Brucejack Gold Mine;

    b. Galore Creek Copper-Gold-Silver ("Galore");

    c. Kerr-Sulphurets-Mitchell ("KSM");

    d. New Polaris Gold Mine; and

    e. Red Chris Porphyry Copper-Gold Mine.

    The Tribes have asserted Aboriginal rights and requested consultation with the Crown with regards to the Excluded Projects.

49. The Order in Council is slated to expire on September 15, 2027.

50. At the time the Province passed the Order in Council, the record before the Province included historical evidence, scholarly ethnographic studies, U.S. government legislation, Tlingit oral history evidence and environmental studies on mining impacts, all as referenced or quoted in the correspondence between January 30 Materials.

51. The EAO never completed the reconsideration process for PIN status on the Eskay Project that it and SEITC had engaged in for over a year, a process in which SEITC and the Seven Tribes invested significant time and resources and participated in good faith.

52. In reliance upon this ongoing process, the Seven Tribes did not pursue other remedies. Instead of continuing and completing the reconsideration process, Order in Council 364/2024 eliminated all the Petitioners' rights to acquire PIN status until September 2027 and terminated the reconsideration process with SEITC and the Seven Tribes.

53. Other than the Eskay Project, at no point did the EAO meaningfully consult the Tribes on the Excluded Projects. None of the Tribes had the opportunity to seek

PIN status or provide evidence in support of their assertions in relation to the other Excluded Projects identified in the Order in Council.

54. After passage of the Order in Council, the government stated that they would consult in accordance with the common law, in particular, *Haida Nation v. B.C. (Minister of Forests)*, 2004 SCC 73 [*Haida*] and *Desautel* cases.

55. Instead of and in spite of repeated requests from SEITC, the Crown has failed to respond to the Tribes' claims as set out in the January 30 materials and has treated them as notification-only Nations, with none of the procedural advantages afforded under either the common law nor by PIN status under the EAA, while stating that it still in the process of reviewing the January 30 Materials.

56. The EAO failed to conduct a preliminary assessment of the January 30 Materials, or, alternatively, it has conducted an assessment but failed to communicate this preliminary assessment with SEITC and engage in a dialogue with SEITC to address any perceived shortcomings in the January 30 Materials.

57. Since SEITC began engaging with the EAO with regards to the Eskay Project, SEITC has received no capacity funding from B.C. and a total of $20,000 from the Impact Assessment Agency of Canada to support engagement on the Eskay Project, for the purpose of reviewing key documents in the environmental assessment for the Eskay Project.

58. On or about May 26, 2025, British Columbia wrote to B.C. First Nations requesting their views on the Crown's duty to consult with U.S. Tribes, stating the Premier's view that U.S.-based Tribes are only entitled to notification, based on a gross mischaracterization of the *Desautel* decision.

C. Traditional Use of the Unuk River Watershed, Including in Canada, By the Tlingit Ancestors of the Seven Tribes

59. The Unuk River forms a slowly rising corridor through the coastal mountains dividing the Alaska Panhandle and B.C. to its source in B.C. There are canyons and narrow passages in some sections along the course of the river and broad sand flats or sloughs in other sections. The oral history of the Sàanyàa Kwáan clans of the Tlingit of the Alaska Panhandle records that a native in a canoe could paddle, pull, rope and walk his canoe to the head in a day and a half.

60. Several oral histories record that the Unuk watershed was used exclusively by the Tèikwèidi Clan of the Sàanyàa Kwáan, the larger Tlingit regional group to which the Tèikwèidi Clan belonged. Under Tlingit law and custom, the Unuk watershed was the recognized territory of the Tèikwèidi Clan.

61. Some of the oral histories are legends that describe the ancestors of the Tèikwèidi Clan travelling to and up the river and naming it the *Jòonax*. Some are Tèikwèidi

Clan family oral histories, transmitted through generations of Tèiḵwèidi knowledge keepers, that record that, traditionally, the Tèiḵwèidi had villages on the Unuk River, upriver on the Canadian side of the Border.

62. Some of the oral histories are legends regarding how the Tèiḵwèidi acquired their brown bear crest while living on the Unuk River. According to Tlingit law and custom, these oral histories signify Tèiḵwèidi ownership of the Unuk River.

63. These oral histories have been kept and transmitted by Tlingit knowledge keepers and still survive despite the imposition of the Border cutting the Tèiḵwèidi off from the Canadian part of the Unuk Watershed and despite the other economic, legal and cultural pressures to which the Tlingit have been subject. The oral histories establish that the Tèiḵwèidi Clan traditionally occupied the Unuk Watershed, including that portion in Canada, and have done so for centuries.

D. Tèiḵwèidi Clan Section 35 Rights on the Unuk River

64. The oral histories also establish that the Tèiḵwèidi traditionally fished for salmon, hunted deer, bear and other species, and trapped mink, fox and other species in the Unuk watershed. Some of this harvesting continues to today but for decades it has been restricted to the Alaskan side of the Border. The harvesting of these resources was integral to the distinctive society of the Alaska Panhandle Tlingit.

65. In addition, the Tèiḵwèidi Clan traditionally harvested eulachon (or ooligan to the Tlingit) in Burroughs Bay and the lower reaches of the Unuk. The small, "saviour fish" appeared at the mouth of the Unuk after the long winter and were caught in considerable quantities by the Tèiḵwèidi over many generations. The Tèiḵwèidi traditionally distributed these considerable quantities to their own villages and to nearby Tribal communities. The Tèiḵwèidi also processed the fresh eulachon into eulachon "grease". The "grease" was used by the Tribes as a condiment all year round. The eulachon harvest on the Unuk and the production and consumption of eulachon grease were integral to the distinctive society of Alaska Panhandle Tribes.

66. The annual Tèiḵwèidi harvest of Unuk River eulachon in the early spring, the distribution of the catch and the production of grease by the Tèiḵwèidi continued annually up to approximately 2002 when the eulachon runs began to decline as a result of the contaminants and accumulation of garbage from the Eskay Creek Mine that had started operating in 1994. The runs withered quickly, and by 2006, Alaska and federal authorities imposed a moratorium on the Unuk River eulachon run.

E. The Seven Tribes Are Modern Day Successors To The Tèiḵwèidi

67. The traditional Tlingit socio-economic system was that matrilineal clans, such as the Tèiḵwèidi, owned and occupied resource territories like the Unuk Watershed. During the spring, summer and fall, the clans lived in settlements or resource camps

upriver and they harvested salmon, deer, bear, and gathered traditional plants. In the winter, the clan groups migrated downriver to winter residence locations or *k̲waáns.* Members of various matrilineal clans lived at a single winter *k̲waáns.*

68. As a result of state- and settlement-caused disruption of their socio-economic order, the concurrent loss of clan territories, the consolidation of clans into *k̲waáns* (villages) and the later organization of those villages into tribal government settlements under US legislation, the Seven Tribes in the general region of the mouth of the Unuk River are modern day successors of the Tèik̲wèidi Clan that used the Unuk watershed. The "displacement of Aboriginal peoples as a result of colonization is well acknowledged" (*Desautel*, para. 33).

F. Potential Adverse Effects on Section 35 Rights.

69. Prior to the operations of the Eskay Creek Mine, members of the Tèik̲wèidi Clan fished on the Unuk River and regularly harvested tens-of-thousands of pounds of eulachon on the Unuk River each year, enough to feed their communities and trade with others, for many generations. In addition, all five species of salmon spawned in the river. Other species, such as bears, relied on the runs, and provided a hunting source for the Seven Tribes.

70. In the mid to late 1990s, the eulachon and salmon runs on the Unuk River began to diminish. The river's water levels began to become lower than usual, and debris and garbage came down the river, which had never been present before.

71. By the early 2000s, the number of eulachon and salmon on the Unuk River had significantly declined. In 2006, the Alaska and federal governments instituted a moratorium on eulachon fishing on the Unuk River, due to the severe declines in the population.

72. The risks associated with mining on watersheds are well-documented. Mining contributes to contamination in water and sediment. It impacts water cycling, physical habitat and the health of many organisms. These risks associated with mining were described and extensively documented in the written submission provided to the EAO in the January 30 Materials, in other correspondence to the EAO by SEITC, and stated by SEITC in numerous meetings with the EAO.

73. Prior to the operation of the Eskay Creek Mine, the number of eulachon harvested had never changed in any significant way over the years. Further, there were always large quantities of eulachon left over after the annual harvest.

74. Since the Eskay Creek Mine's closure, and particularly in the last few years, the eulachon runs, and to some extent the salmon runs, on the Unuk have been slowly returning.

75. In 2021, the Alaska and federal governments began to permit rural residents of Alaska to harvest eulachon on the Unuk, limiting catches to five gallons per household.

76. Being unable to fish for eulachon on the Unuk River for nearly two decades and now having severely restricted catches has resulted in a lost generation of practicing and passing on the harvesting and preparation of eulachon, which has been essential to the subsistence and culture of the Seven Tribes since time immemorial.

77. The operation of the Eskay Creek Mine affected the entire Unuk Watershed ecosystem, including by polluting the waters of the river, and decimating the eulachon fisheries. The watershed is only now recovering. The risk of pollution from the Eskay Project threatens the Seven Tribes' means of subsistence, health, culture, and well-being, by interfering with their rights to fish and hunt in the Unuk watershed.

Part 3: LEGAL BASIS

I. THE ORDER IN COUNCIL IS *ULTRA VIRES* THE ELUA

1. Reviewing the *vires* of subordinate legislation is an exercise of statutory interpretation to ensure that the delegate has acted within the scope of their lawful authority under the enabling statute. Accordingly, the governing statutory scheme, other applicable statutory or common law, and the principles of statutory interpretation are relevant constraints when reviewing the *vires* of subordinate legislation: *Auer v Auer*, 2024 SCC 36 [*Auer*], paras. 59-60, para. 63; *TransAlta Generation Partnership v Alberta*, 2024 SCC 37 [*TransAlta*] at para. 170. Constitutional principles are also relevant constraints.

2. Subordinate legislation must be consistent with specific provisions of the enabling statute and with its overriding purpose or object (*Auer,* para. 33). The words of the enabling statute must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Auer,* para. 64.

3. Section 7 (1) of the ELUA provides that the LGIC may make orders "respecting the environment or land use" despite any other Act or regulation, on the recommendation of the Environment and Land Use Committee (the "Committee"). The words "respecting the environment or land use" must be read harmoniously with rest of the statute, the object and purpose of the Act, and the duties of the Committee.

4. ELUA does not contain a purpose clause. However, the wording of ELUA in its entire context and together with extrinsic evidence shows that the object and purpose was: a) the protection of the environment through management of development and the need for public involvement and; b) the establishment of protected areas and conservancies.

5. Further, the object and purpose of ELUA is demonstrated by the duties of the Committee responsible for making recommendations under s. 7. ELUA seeks to foster greater public participation in and awareness of the environment (s. 3 (a)), and to "ensure that all the aspects of preservation and maintenance of the natural environment are fully considered in the administration of land use and resource development" to "prevent waste of those resources, and despoliation of the environment" (s. 3 (b)).

6. Under s. 2(2)(b) of the EAA, the statutory purposes of the EAO include "support[ing] reconciliation with Indigenous peoples in B.C. by … acknowledging Indigenous peoples' rights recognized and affirmed by section 35 of the *Constitution Act, 1982* in the course of assessments and decision making under this Act."

7. The Order in Council is aimed at excluding the Tribes from an enhanced process for consultation in the review of resource development projects that may potentially harm the natural environment in their traditional territories and harm fragile resources that they have harvested for generations. The Order in Council eliminates statutory rights which enable Indigenous Nations, like the Tribes, to participate more fully in the assessment of the Excluded Projects. By depriving the Tribes of PIN status, the Order in Council ensures that, with respect to the Excluded Projects, a crucial perspective on and aspect of the preservation and maintenance of the natural environment will not be fully considered, directly contrary to the object and purpose of ELUA.

8. The applicable common law is a relevant constraint when interpreting s. 7 (1): *Auer; TransAlta.* The applicable common law includes *Haida*, which holds that the honour of the Crown imposes a duty to consult on the Crown as long as the Indigenous Nation has raised a "credible but unproven claim" regarding a potential Section 35 right (*Haida*, at para. 37).

9. The elimination of PIN status eliminates a statutory form of Crown consultation that provides an enhanced ability to assess the potentially harmful environmental effects of projects on Indigenous Nations. It also eliminates the Tribes' potential statutory rights to accommodation, thus rendering consultation "meaningless" (*Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, at para. 54). The Order in Council is at odds with *Haida* and the honour of the Crown.

10. The stated reason for the Order in Council, to develop a consultation policy for U.S.-based Aboriginal peoples of Canada, by consulting B.C. First Nations and excluding SEITC and the Tribes from the EAA PIN process, has no basis in law and is inconsistent with the law of consultation, in particular, *Haida* and *Desautel.*

11. The delegated power to make orders under s. 7 (1) has been exercised for a purpose which is directly contrary to the overriding purpose or object of ELUA. It is contrary to relevant common law and the honour of the Crown. It is also contrary to the stated purposes of the EAA.

12. In sum, the passing of the Order in Council exceeded the authority given by s. 7 (1), and is therefore *ultra vires.*

13. In the alternative, there is ambiguity in the scope of the delegated power conferred on the executive by s. 7 (1) of the ELUA because the scope of the power is ill-defined and capable of undermining legislative will in areas far beyond the purpose or object of the statute. Given the ambiguity in the scope of the delegated power, s. 7 (1) must be construed.

14. Section 8.1(2) of the *Interpretation Act*, RSBC 1996, c 238, requires that every enactment "must be construed as upholding and not abrogating or derogating from the Aboriginal and treaty rights of Indigenous peoples as recognized and affirmed by section 35".

15. In addition, international instruments such as the *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2007) ["UNDRIP"], inform the contextual approach to statutory interpretation and should inform the approach to s. 7 (1).

16. In *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 [*Reference*], the Supreme Court of Canada concluded that UNDRIP "has been incorporated into the country's positive law" by the enactment of the *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 ("UNDA") (*Reference*, para. 4).

17. Given the substantial similarities between the UNDA and the *Declaration on the Rights of Indigenous Peoples* Act, SBC 2019, c 44 ("DRIPA"), UNDRIP has been incorporated into B.C.'s positive law as a result of DRIPA.

18. Section 8.1(3) of the *Interpretation Act* supports this position. That section requires that every Act be "must be construed as being consistent with" the *Declaration on the Rights of Indigenous Peoples* Act, SBC 2019, c 44. This requires the court to interpret provincial laws "with the overlay that it is consistent with *UNDRIP*" (*Gitxaala v British Columbia (Chief Gold Commissioner)*, 2023 BCSC 1680, para. 471).

19. Therefore, the LGIC was required to adopt an interpretation of its authority under s. 7 (1) that is consistent with relevant UNDRIP Articles (*Auer,* para. 63). Articles 19, 20(1), 25, 29(2), 32(2) and 36(1) are engaged in this proceeding.

20. In the further alternative, the Order in Council results in administrative discrimination. Subordinate legislation that results in administrative discrimination is invalid unless the discrimination is authorized by the enabling statute, either expressly or by necessary implication (*TransAlta*, para. 42). In *TransAlta*, the subordinate legislation was found to authorize administrative discrimination by necessary implication.

21. The object and effect of the Order in Council is to administratively discriminate against the Tribes. Unlike the legislation in *TransAlta*, s. 7 (1) of ELUA contains no provisions authorizing administrative discrimination either expressly or by necessary implication.

22. In the further alternative, the Crown alerted SEITC that it was considering using the ELUA to deny the Tribes PIN status. SEITC responded that the ELUA was not intended to be used for that purpose. Under the circumstances, the LGIC was required to justify its interpretation of the ELUA (*Pepa v Canada*, 2025 SCC 21 at paras. 62-64).

23. No reasons were provided by the LGIC. A letter, dated June 27, 2024, stated that the Province intended to develop a separate consultation policy for U.S.-based Tribes in consultation with B.C. First Nations.

24. The Crown did not address SEITC's position that the ELUA could not be relied upon to deny them PIN status and the Crown therefore failed to justify its interpretation of ELUA. In addition, the position of the Crown that B.C. First Nations needed to be consulted on the Province's approach to SEITC and the Tribes has no basis in the common law UNDRIP.

25. In summary, the passage of the Order in Council by the LGIC under s. 7 (1) of the ELUA is *ultra vires* for the following reasons:

    a. it is inconsistent with and directly contradictory to the purposes of ELUA;

    b. in the alternative, it abrogates and derogates from Section 35 rights, contrary to s. 8.1 (2) of the *Interpretation Act;*

    c. in the further alternative, it is inconsistent with UNDRIP, contrary to s. 8.1 (3) of the *Interpretation Act* and the *Reference* decision; and

    d. in the further alternative, it violates the common law rule against administrative discrimination.

26. In addition, the LGIC's interpretation of its authority under s. 7 (1) is unreasonable, in part because it failed to discharge its burden of justification. The Order in Council is not authorized by the ELUA and should be quashed.

II. THE CROWN FAILED TO AFFORD SEITC AND THE TRIBES PROCEDURAL FAIRNESS

27. A duty of procedural fairness lies on every public authority making an administrative decision which affects the rights, privileges, or interests of an individual (*Canada (Attorney General) v Mavi*, 2011 SCC 30 at para. 38).

28. The circumstances affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights (*Baker v Minister of Citizenship and Immigration*, [1999] 2 SCR 817 at para. 26).

29. A heightened duty of procedural fairness was owed to the Tribes in determining whether they were entitled to PIN status. The rights that could be denied by an adverse decision under s. 14 (2) are a statutory iteration and expansion of the consultation rights required by Section 35 and *Haida.* The foundation of the duty to consult is the honour of the Crown: *Haida*, para. 16. The honour of the Crown heightens the procedural fairness obligations of the EAO under s. 14 (2).

30. In the absence of an adverse determination under s. 14 (2), the default under s. 14 is that the Indigenous Nation remains entitled to PIN status. Further, the reconsideration process in which the EAO engaged for a year and a half not only required a determination under s. 14 (2) but equally required the EAO to give reasons for an adverse determination pursuant to s. 14 (3). In the premises:

    a. The requirement for reasons also heightened the procedural fairness obligations on the EAO;

    b. In the absence of reasons at the culmination of the reconsideration process, the EAO has not met the statutory requirements to make a valid determination under s. 14 (2); and

    c. In the absence of a valid adverse determination under s. 14 (2), SEITC and the Seven Tribes remain entitled to PIN status.

31. SEITC participated in the s. 14 reconsideration process with the EAO in good faith, collecting and expending the scarce community resources of the Seven Tribes and providing extensive evidence and submissions in support of its s. 14 (2) application. Rather than render a reconsideration decision under s. 14 (2), (which should have granted SEITC, on behalf of the Tribes, PIN status), the LGIC ignored the

obligations on the EAO arising from the reconsideration process and passed Order in Council 364/2024, excluding the Tribes from PIN status. The LGIC thereby breached the duty of procedural fairness and the doctrine of legitimate expectations. The LGIC also thereby breached the honour of the Crown.

32. The breach of procedural fairness, in relation to the PIN status that was sought in relation to the Eskay Project, is compounded by all the Tribes being denied even the opportunity to seek PIN status on the other Excluded Projects.

33. The Crown sought to justify its abandonment of the reconsideration process by representing that, notwithstanding SEITC and the Tribes' exclusion from the PIN process under the EAA, the Crown would fulfill its common law obligations under *Haida* and *Desautel*. However, SEITC has not been meaningfully consulted and has only been afforded "notification" status. January 30 Materials establish that SEITC and the Seven Tribes are entitled to meaningful consultation and not mere notification.

34. The Crown's conduct in terminating the lengthy s.14 reconsideration process prior to its conclusion and passing the Order in Council constitutes bad faith and sharp dealing. Such conduct is inconsistent with the honour of the Crown, with the duty of consultation that the Crown owes the Tribes in relation to the Excluded Projects, and with the statutory purposes of the EAO as set out in s. 2 (1) of the EAA.

35. The threshold for the EAO to make an adverse determination under s. 14 (2) is that the EAO has determined that there is no reasonable possibility the Indigenous nation or its rights recognized and affirmed by Section 35 will be adversely affected by the project.

36. The EAO's determination under s. 14 (2) must be informed by Section 35 jurisprudence. The right to *Haida* consultation does not require formal proof on a balance of probabilities as in a trial. Where the right sought under s. 14 PIN status is essentially a right to consultation, Section 35 only requires that the Seven Tribes to show that they have a credible claim to Section 35 rights as the modern-day successors to the Tèi<u>k</u>wèidi Clan that traditionally owned and used the Unuk Watershed: *Haida*, at para. 37.

37. SEITC and the Seven Tribes met this threshold before the EAO and are entitled to PIN status.

III. BREACH OF THE DUTY TO CONSULT

38. Consultation is a distinct constitutional process requiring powers to effect compromise and do whatever is necessary to achieve reconciliation of divergent Crown and Aboriginal interests.

39. The duty seeks to ensure that Aboriginal rights are *identified, protected and preserved* while furthering the goals of reconciliation between Aboriginal peoples and the Crown (*Haida* at para. 25).

40. There are three conditions that must exist for this duty to arise: 1) actual or constructive knowledge of a claim or right; 2) Crown conduct that may adversely impact the claim or right in question; 3) The claimant must show a causal connection between the proposed Crown conduct or decision and the potential adverse impact(s) (*Rio Tinto Alcan v Carrier Sekani Tribal Council,* 2010 SCC 43 at paras. 40-45).

41. The duty to consult is triggered at a low threshold: "[k]nowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate." (*Mikisew Cree First Nation v Canada,* 2005 SCC 69 at para 34).

42. Determining the existence, extent and content of the duty to consult involves a question of law reviewable on the correctness standard. Whether the duty to consult has been triggered is judged on the correctness standard (*Mikisew Cree First Nation v Canadian Environmental Assessment Agency,* 2023 FCA 191 at paras. 16-18).

43. Prior to April 2021, the Crown did not owe a constitutional duty to consult Aboriginal groups that were not currently resident in Canada.

44. In *Desautel*, the Supreme Court of Canada held that "aboriginal peoples of Canada" in Section 35 means the modern-day successors of Aboriginal societies that occupied Canadian territory at the time of contact.

45. *Desautel* provides that the Crown may owe a duty to consult and potentially accommodate Indigenous Groups resident in the United States, but the onus is on those groups to put the Crown on notice of their claims and the Crown then must make a decision on whether to consult and the level of consultation. Both of these decisions are reviewed on a correctness standard.

46. SEITC and the Seven Tribes have provided the Crown with ample evidence that the Tlingit Tèiḵwèidi Clan occupied Canadian territory at the time of contact.

47. SEITC and the Seven Tribes have shown that they are the modern successors to the Tlingit Tèiḵwèidi Clan. Courts must be mindful of the inherent evidentiary difficulties faced by Indigenous litigants in attempting to prove their historical and cultural practices or their successorship over a gap of a hundred years or more (*Mitchell v MNR*, 2001 SCC 33, at para. 27; (*Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc.* 2022 BCSC 15, at paras. 225-232; *Cowichan Tribes v Canada (Attorney General)*, 2025 BCSC 1490, paras. 85-86).

48. To demand detailed proof of successorship is unreasonable given the 150 years of state and settler disruptions of and pressures on the Alaska Panhandle Tribes. It

would be an extraordinarily difficult task, to the point of impossibility, to require SEITC and the Seven Tribes to specifically prove genealogical succession in the face of colonization, when both the cultural clan connections and the geographical clan ties to traditional territories have been severed by these state and settler forces.

49. All three conditions to establish a duty to consult under *Haida* were met in this case. There is no dispute that there is Crown conduct, and the Petitioners have demonstrated potential adverse effects. SEITC provided detailed information about the Seven Tribes' Section 35 rights in B.C., particularly in relation to the Eskay Creek Project in the Unuk Watershed. All the Tribes were denied the opportunity to make the same arguments in relation to the other Excluded Projects. The Crown was obligated, at the latest by January 30, 2024, to meaningfully consult with SEITC on behalf of the Seven Tribes. At no point since that date, contrary to the honour of the Crown and the duty of consultation, has the Crown engaged in good faith consultation with SEITC. Instead, the Crown abandoned the reconsideration process, contrary to the honour of the Crown.

50. SEITC was entitled to deep consultation, commensurate with the Seven Tribes' strong *prima facie* claims to rights in the Unuk Watershed.

51. After passage of Order in Council 364/2024, the Crown promised that SEITC would be consulted in accordance with the Crown's common law obligations pursuant to *Haida* and *Desautel*.

52. Contrary to the honour of the Crown, the Crown has chosen to ignore the record provided by SEITC which entitles SEITC to deep consultation on the Excluded Projects. Instead, SEITC's participation in the review of the Excluded Projects has been limited to notification only.

53. In these circumstances, the honour of the Crown requires the Crown to make a preliminary assessment of the January 30 Materials, communicate that assessment to SEITC, and provide it with an opportunity to respond (*Chartrand v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2015 BCCA 345).

54. The EAO has failed to conduct an assessment of the January 30 Materials, or, alternatively, it has conducted an assessment but failed to communicate this assessment with SEITC and engage in a dialogue with SEITC to address any perceived shortcomings in the January 30 Materials.

55. Leading up to the passage of Order in Council 364/2024, the Crown failed to communicate a preliminary assessment, failed to engage in a dialogue with SEITC, and failed to engage in meaningful consultation. The Crown's decision to not meaningfully consult with SEITC and the Tribes is incorrect and not entitled to any deference.

56. Given the nature and scope of the rights potentially affected by the Excluded Projects on the Tribes' asserted rights and the potential infringement and risk of non-compensable damage, the Crown had and continues to have a duty of consultation at the highest end of the spectrum (*Haida* at para. 44).

57. UNDRIP has been incorporated into B.C.'s positive law as a result of DRIPA. UNDRIP is an added contextual layer that informs the scope and content of the Crown's duty to consult, and whether the Crown had met that duty (*Kebaowek First Nation v. Canadian Nuclear Laboratories*, 2025 FC 319 at paras. 128-132). Articles 29(2) and 32(2) are engaged in this case, triggering the UNDRIP free, prior and informed consent ("FPIC") standard. The duty to consult in this case required the Crown to engage the FPIC standard, granting the Tribes a right to a robust process, consistent with UNDRIP and the duty of deep consultation.

The Petitioner relies upon:

a) *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c. 11;

b) *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241;

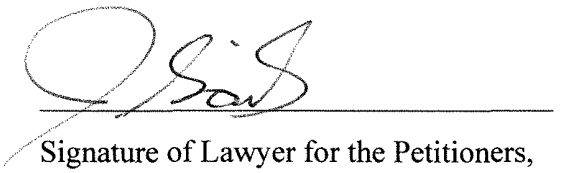
c) *Environment and Land Use Act,* R.S.B.C. 1996, c. 117; and,

d) *Environmental Assessment Act,* S.B.C. 2018, c. 51.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit No. 1 of Guy Archibald, dated November 10, 2025;
2. Affidavit No. 1 of Sylvia Banie, dated November 10, 2025;
3. Affidavit No. 1 of Louie Wagner, dated November 1, 2025;
4. Affidavit No. 1 of Cindy Wagner, dated November 1, 2025;
5. Affidavit No. 1 of Zoey Schutz, dated November 19, 2025; and
6. Such further affidavits and materials as counsel may advise.

Date: November 19, 2025



Signature of Lawyer for the Petitioners,
John W. Gailus

To be completed by the court only:

Order made

[ ] in the terms requested in paragraphs ..... of Part 1 of this petition

[ ] with the following variations and additional terms:

_____

_____

_____

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_____

Date: _____, 2025	_____ Signature of [ ] Judge [ ] Associate Judge